Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

JEFFREY HULL,

Petitioner,

v.

RICHARD H. FALLON, M.D., and
PRUDENTIAL HEALTHCARE SYSTEM, INC., et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Two provisions of ERISA are being interpreted by lower courts as pre-empting state malpractice laws. This Court is currently reviewing conflict pre-emption under ERISA §514(a) in *United States Healthcare Systems of Pennsylvania, Inc. v. Pennsylvania Hospital Insurance Co. and the Commonwealth of Pennsylvania Medical Professional Liability Catastrophe Loss Fund,* Supreme Court No. 98-1836. *(United States Healthcare Systems).* This case involves the other provision, "complete pre-emption" under §502(a).

> Does §502(a) of ERISA pre-empt a state malpractice claim against an ERISA-governed health plan and its medical director, if that claim is based on a decision by the health plan that a particular procedure is not "medically necessary"?

PARTIES TO THE PROCEEDING

Petitioner

Jeffrey D. Hull is a private citizen. Mr. Hull is an individual and has no corporate affiliations.

Respondents

Richard H. Fallon, M.D., Prudential Health Care System, Inc., Prudential Health Care System, Inc., d/b/a Prudential Health Care Health Maintenance Organization, Prudential Health Care System, Inc., d/b/a Prudential Health Care System, St. Louis Health Care Management; Prudential Health Care System, Inc., d/b/a Prudential Health Care Health Maintenance Organization, a/k/a Prucare, HMO; Prudential Insurance Brokerage, Inc., d/b/a Pruco Life Insurance Company, The Prudential Insurance Company of America, The Prudential Insurance Company of America, d/b/a Prudential Insurance and Financial Services, The Prudential Insurance Company of America, d/b/a Prudential Health Care System, St. Louis Health Care Management the Prudential Insurance Company of America, d/b/a Prudential Health Care Health Maintenance Organization; Prudential Insurance Company of America, d/b/a Prudential Healthcare Health Maintenance Organization, a/k/a Prucare, HMO, and Pruco Securities Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully asks this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported at 188 F.3d 939. App. la-8a. The Opinion of the District Court for the Eastern District of Missouri is not published. It is included in Appendix at 9a-16a. The denial of the Petition for Rehearing En Banc and Petition for Rehearing by the panel dated October 7, 1999, by the United States Court of Appeals, Eighth Circuit, is printed in the Appendix at 17a.

JURISDICTIONAL STATEMENT

The District Court assumed jurisdiction of this action pursuant to 28 U.S.C. §1331 and 29 U.S.C. §1132(a).

An appeal was taken to the Eighth Circuit Court of Appeals pursuant to 28 U.S.C. §1291. The judgment in the Court of Appeals was entered August 23, 1999. Petitioner filed a Petition for Rehearing by the panel, or, in the alternative, for rehearing en banc. The Court of Appeals denied the Petition on October 7, 1999.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. §1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause of the United States Constitution provides that the laws of the federal government "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary nothwithstanding." U.S. Const., art. VI, cl.2.

ERISA §502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B) provides:

> (a) A civil action may be brought -
>
> (1) By a participant or beneficiary -
>
> (A) * * * *
>
> (B) To recover benefits due to him under the terms of the plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; . . .

ERISA §502, 29 U.S.C. §1132 further provides that:

> State courts have competent jurisdiction and District Courts of the United States shall have concurrent jurisdiction of any action under subsection (a)(1)(B) of this section.

STATEMENT OF THE CASE

Petitioner, Jeffrey Hull, commenced this action in Missouri state court in January, 1998. His petition alleged medical malpractice against respondent Prudential's medical director, Richard H. Fallon, M.D., and vicarious liability for said negligence against Prudential Health Care Systems, Inc., and other Prudential organizations (Prudential). All claims against Prudential were based on the theories that Dr. Fallon was acting as an ostensible agent, servant, or employee of Jeffrey Hull's health insurance plan and challenged the quality of care Mr. Hull actually received.

Fallon and Prudential removed the action to the United States District Court for the Eastern District of Missouri. Fallon and Prudential recharacterized plaintiff's complaint alleging that it had been artfully pleaded because Dr. Fallon had never entered into a doctor-patient relationship with Jeffrey Hull. Respondents alleged they were only administering benefits on behalf of an ERISA plan. Based on that recharacterization, they alleged plaintiff was really bringing an action to recover benefits under §502(a) of ERISA and therefore federal jurisdiction was pre-emptive and exclusive.

All of Petitioner's claims center around the health plan medical director's judgment that a sophisticated heart test was not "medically necessary" and as a result of this decision Jeffrey Hull is now permanently disabled. The District Court agreed with respondents' recharacterization of Hull's claim and denied Petitioner's Motion for Remand and granted the dismissal of Hull's claim as pre-empted under §502(a) of ERISA. The Eighth Circuit affirmed that judgment.

REASONS FOR GRANTING THE PETITION

I. Comparing 502(a) and 514(a) Pre-emption

There is a difference between complete pre-emption under ERISA §502(a) and conflict pre-emption under ERISA §514(a) 29 U.S.C. §1144(a). Complete pre-emption under ERISA §502(a) is an exception to the well-pleaded complaint rule and has jurisdictional consequences since it recharacterizes state law claims as claims arising under federal law. *See Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 64-67 (1987).

Conflict pre-emption under ERISA §514(a), however, does not recharacterize claims as arising under federal law. Rather, preemption under ERISA §514(a), serves as a defense to a state law claim. (*Compare Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 52-56 (1987) that examines the scope of pre-emption under ERISA §514(a) with *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. at 64 which states that ERISA pre-emption under §514(a) "without more, does not convert a state claim into an action arising under federal law.")

Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 23, 27 (1983) holds that pre-emption under ERISA §514 does not permit a defendant to remove a suit from state court to federal court when the plaintiff's state claim does not fall within the scope of §502. Therefore, to determine whether Dr. Fallon and Prudential properly removed this action to federal court, this Court must determine whether any of Hull's claims fit within the scope of §502(a).

Federal courts have concurrent jurisdiction with state courts over individual claims for benefits under the terms of

an employee benefit plan, but federal courts alone have exclusive jurisdiction over all other claims authorized by ERISA §502(a); ERISA §502(a), 29 U.S.C. 1132(a) In order to remove a state law claim, that claim must be displaced by ERISA's civil enforcement provisions under §502(a). *Ingersoll-Rand v. McClendon,* 498 U.S. 133 (1990).

If the state law claim cannot be brought under ERISA's civil enforcement provisions, then there is no federal question jurisdiction under ERISA and removal is improper unless the claim is properly recharacterized as a state law complaint displaced by §502(a)(1)(B) as an action arising under federal law. *See, Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 63-64 (1987).

II. The Decision Below Conflicts With This Court's Decisions Construing §502(a) Of ERISA And With The Third Circuit's Decisions On The Same Issue.

In it's decision below, the Eighth Circuit ignored recent Supreme Court decisions relating to this question and decided Mr. Hull's claim was completely pre-empted by §502(a) of ERISA. This ruling is also in conflict with the Third Circuit on this issue as set forth in *Dukes v. U.S. Healthcare, Inc.,* 57 F.3d 350 (3rd Cir. 1995, *cert. denied,* 516 U.S. 1009 (1995) and *In Re U.S. Healthcare, Inc.,* 193 F.3d 151 (3rd Cir. 1999). In both *Dukes* and *In Re U.S. Healthcare,* the Third Circuit held that the delay or denial of a medically necessary procedure by an HMO constituted, in effect, a "discretionary medical decision rather than an administrative one" and therefore was not subject to federal pre-emption. *In Re U.S. Healthcare, Inc.,* 193 F.3d 151, 164

(3rd Cir. 1999); *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d, 350, 358 (3rd Cir. 1995).

This Court gave ERISA pre-emption a broad reading in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987). That decision was relied on by the Eighth Circuit in their decision below. However, the Eighth Circuit erred in failing to note this Court's decision in *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995). In *Travelers*, the Court cautioned "nothing in the language in the ERISA or in the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern." 514 U.S. at 661.

Subsequent cases to *Travelers* have continued this trend. In *California Division of Labor Standards Enforcement v. Dillingham Construction N.A., Inc.*, 519 U.S. 316 (1997) a majority of this Court relied on *Travelers* to find that a California prevailing wage law was not pre-empted by ERISA. A cogent concurrence authored by Justice Scalia and joined by Justice Ginsberg recognized that the scope of ERISA pre-emption had been narrowed.

> I think it would greatly assist our function of clarifying the law if we simply acknowledge that our first take on this statute was wrong; that the "relate to" clause of the pre-emption provision is meant, not to set forth a *test* for pre-emption but rather to identify the field in which ordinary *field pre-emption* applies - namely the field of laws regulating "employee benefit plans [as] described in §1003(a) of this title and not exempt under §1003(b) of this

title" 29 U.S.C. §1144(a). *Dillingham,* 519 U.S. at 335

The Third Circuit has followed the *Travelers'* line of reasoning.

> When the HMO acts under the ERISA plan as a health care provider, it arranges and provides medical treatment, directly through contracts with hospitals, doctors, or nurses . . . in performing these activities, the HMO is not acting in its capacity as a plan administrator, but as a provider of health care, subject to the prevailing state standard of care. *In Re U.S. Healthcare Inc.,* 198 F.3d at 162.

The Third Circuit also followed this Court's reasoning in *Dillingham* where this Court stated:

> Indeed, if ERISA were concerned with any state action such as medical-care quality standards or hospital workplace regulations - that increased costs of providing certain benefits, and thereby potentially affected the choice made by ERISA plans, we could scarcely see the end of ERISA's pre-emptive reach, and the words "relate to" would limit nothing. 519 U.S. at 329.

Like the plaintiffs in *Dukes* and *In Re U.S. Healthcare, Inc.,* Jeffrey Hull phrased his claim as a denial of the *quality* of medical care he was provided.

III. This Court's Review Is Needed To Bring Clarity To The Scope Of Both Pre-emptive Provisions Of ERISA

This case contrasts sharply with the fact pattern in *United States Healthcare Systems,* Supreme Court No. 98-1836. That case does not involve a determination by a health plan of "medical necessity". There is no dispute Mr. Pappas needed to be transferred for emergency surgical intervention. In Jeffrey Hull's case, the health plan medical director, who never saw or examined Hull, twice disagreed with the primary care physician as to the appropriate diagnostic medical test for Hull's heart condition.

Both *United States Healthcare Systems,* and *Kuhl v. Lincoln Nat. Health Plan,* 999 F.2d 298 (8th Cir. 1993) are examples of standard "coverage" cases as opposed to "medically necessary" (also known as "utilization review"). Coverage decisions involve resolution of simple contractual issues such as: Can a patient be transferred to an "out-of-network" hospital? Or: Can the patient be treated by a "non-plan" physician?

Jeffrey Hull's case represents the other common area where ERISA plans avoid liability for negligent decisions. By making prospective determinations regarding payment for a particular medical procedure, ERISA plans, in effect, are practicing medicine.

> By its very nature, a system of prospective decisionmaking influences the beneficiary's choice among treatment options to a far greater degree than does a theoretical risk of disallowance of a claim facing a beneficiary in a retrospective system. Indeed, the perception

> among insurers that prospective determinations result in lower health care costs is premised on the likelihood that a beneficiary, faced with the knowledge of specifically what the plan will and will not pay for, will choose the treatment option recommended by the plan in order to avoid risking total or partial disallowance of benefits. *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1332 (5th Cir. 1992)

Though Jeffrey Hull's claim would not be pre-empted if it was venued in the Third Circuit, commentators have recognized the distinction between the "quality of care" and "denial of benefits" created by *Dukes* and *In Re U.S. Healthcare, Inc.*, is a false one. Under that distinction, "a pre-emption defense will fail as long as medical care is actually delivered, regardless of how poor in quality. Ironically, the pre-emption defense will succeed when necessary care is not delivered at all." Note: *ERISA Pre-emption: Immunity For HMOs,* (1998) U.Ill.L.Rev. 199, 223.

Furthermore, the Third Circuit's conclusion is ultimately troubling. "If a patient receives such poor care that it amounts to a denial of benefits, then ERISA may well pre-empt any claim of malpractice. This is likely to leave the most severely injured plaintiffs without any remedy if they belong to an ERISA plan". W. Mariner, *"Liability for Managed* Care *Decisions: The Employee Retirement Income Security Act (ERISA) and the Uneven Playing Field".* 86 American Journal of Public Health No.6 (June, 1996).

Finally, the Third Circuit's distinction is imperfect because it fails to take into account the multiple roles in health care played by HMOs. Instead, it promotes a separation between HMOs acting as reviewers of medical decisions, and

those who, in effect, assume the role of medical providers. "Considering the many configurations an employee health plan may take and the interrelated nature of cost containment and medical decision making in today's health care environment, the distinction forges antiquated definitions and models of health care delivery on a system that has outgrown them." Note: *ERISA Pre-emption: Immunity For HMOs,* (1998) U.Ill.L.Rev. 199, 223.

Medicare and Medicaid patients can sue their HMO for malpractice under state laws. Governmental health plans are excluded from ERISA pre-emption as well. "Since pre-emption claims turn on Congress' intent", *Travelers,* 514 U.S. at 655, this Honorable Court should hestitate to conclude Congress intended only non-governmentally employed people and their familes be deprived protection of state medical malpractice laws.

CONCLUSION

This is a simple straightforward case. It provides this Court an opportunity to decide whether patients in this country "enjoy the right to be free from medical malpractice regardless of whether . . . care is provided through an ERISA plan. *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 358 (3rd Cir. 1995); *In Re U.S. Healthcare, Inc.*, 193 F.3d 151, 161 (3rd Cir. 1999). By deciding this case along with *United States Healthcare Systems,* Supreme Court No. 98-1836, the Court will have a full and complete factual record to resolve

the difficult issues of statutory construction relating to both pre-emption provisions of ERISA.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed: August 23, 1999]

No. 99-1036

Appeal From The United States District Court
For The Eastern District Of Missouri

JEFFREY D. HULL,
Appellant,

v.

RICHARD H. FALLON, M.D., et al.,
Appellees.

BEFORE: BEAM and MORRIS SHEPPARD ARNOLD, Circuit Judges, and KYLE,[1]

OPINION: BEAM, Circuit Judge.

Jeffrey Hull filed a medical malpractice action in state court against the administrator of his health plan and asserted

[1] The Honorable Richard H. Kyle, United States District Judge for the District of Minnesota, sitting by designation.

vicarious liability on the part of his health care plan for the claim. The defendants removed the action to federal court claiming federal question jurisdiction under ERISA[2] and preemption of the state law claims. Hull moved to remand the case back to state court. The district court[3] held that appellant's state law claims were preempted by ERISA, and, as pleaded, failed to state a cause of action under ERISA. The defendants' motion to dismiss was granted. We affirm.

I. BACKGROUND

Jeffrey Hull was an employee of Prudential Insurance Company, and participated in a health insurance plan issued by Prudential Health Care Plan, Inc. (the Plan), an employee welfare benefit plan under ERISA. *See 29 U.S.C. § 1002.* In January 1996, Hull went to Dr. Delcau, his primary care physician, complaining of shortness of breath, chest pain, and arm pain. Dr. Delcau was a member physician of the Plan. Hull alleges that on two occasions, once in January, and again in February, Dr. Delcau contacted Dr. Fallon, the Plan's administrator, regarding his diagnosis and treatment plan for Hull, requesting authorization to administer a thallium stress test. Dr. Fallon denied both requests for a thallium stress test and instead authorized a treadmill stress test. Hull claims that, as a result of the denial of the thallium test, he suffered

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[2] Employee Retirement Income Security Act, *29 U.S.C. §§ 1001 et seq.*

[3] The Honorable Rodney W. Sippel, United States District Judge for the Eastern District of Missouri.

a myocardial infarction and developed additional heart disease.

As indicated, Hull filed a medical malpractice action in state court, alleging that Dr. Fallon, the Plan administrator, failed to exercise a sufficient degree of care in diagnosing and treating hint Hull also claims that the Plan is vicariously liable for Dr. Fallon's alleged negligence. Fallon and the Prudential defendants filed a notice of removal to federal district court pursuant to *28 U.S.C. § 1441*, arguing that Hull's claims were preempted by ERISA, thus creating federal question jurisdiction. They also filed a motion to dismiss for failure to state a cognizable cause of action under ERISA. The district court found that Dr. Fallon was not acting a s a treating physician, but rather as a plan administrator, thus Hull's claims were based on a denial of benefits and could have been brought only under section 502(a) of ERISA (claims for denial of benefits),[4] and thus were preempted by federal law. The

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[4] Section 502(a) provides in pertinent part:
A civil action may be brought -
(1) by a participant or beneficiary -
(A) for the relief provided for in subsection (c) of this section, or
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;
. . .
(3) by a participant, beneficiary, or fiduciary
(A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
(B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter

district court further found that, as pleaded, Hull failed to state a claim cognizable under ERISA and granted Hull thirty days to amend his complaint. Hull did not file an amended complaint, but filed this appeal, asserting that his claims are not preempted.

II. DISCUSSION

Because there is not complete diversity between the parties, the district court could only have jurisdiction to consider the case if there is federal question jurisdiction. Federal question jurisdiction requires that the action arise "under the Constitution, laws, or treaties of the United States." *28 U.S.C. § 1331.* Generally, an action arises under federal law only if issues of federal law are raised in the plaintiffs well-pleaded complaint. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 95 L.Ed. 2d 55, 107 S. Ct. 1542 (1987). An exception to this rule is the "complete preemption" doctrine. This doctrine provides that "to the extent that Congress has displaced a plaintiff's state law claim . . . a plaintiff's attempt to utilize the displaced state law is properly 'recharacterized' as a complaint arising under federal law." *Rice v. Panchal*, 65 F.3d 637, 640 n.2 (7th Cir. 1995). Thus, federal question jurisdiction exists - and the case may be removed to federal court - if Hull's state law claims arise in an area that has been displaced by ERISA.

ERISA is a comprehensive statute designed to promote the interests of employees by regulating the creation and

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or the terms of the plan;
29 U.S.C. § 1132(a).

administration of employee benefit plans. Consistent with the decision to create a comprehensive, uniform federal scheme, Congress drafted ERISA's preemption clause in broad terms. *See Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137-138, 112 L.Ed. 2d 474, 1111 S. Ct. 478 (1990) ("deliberately expansive language was designed to establish pension plan regulation as exclusively a federal concern"). Congress preempted "all State laws insofar as they may now or hereafter relate to any employee benefit plan." *29 U.S.C. § 1144(a)*. The United States Supreme Court has concluded that suits under section 502(a) of ERISA present a federal question for purposes of federal court jurisdiction. *See Taylor*, 481 U.S. at 66. Causes of action within the scope of, or that relate to, the civil enforcement provisions of 502(a) are removable to federal court despite the fact the claims are couched in terms of state law. *See id.*; *Kuhl v. Lincoln Nat'l Health Plan, Inc.*, 999 F.2d 298, 302 (8th Cir. 1993); *Rice*, 65 F.3d at 641. Not only does this complete preemption confer federal jurisdiction, it also limits claims and remedies exclusively to those provided by section 502(a). *See Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 54, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987); *Kuhl*, 999 F.2d at 302.

The issue of jurisdiction in the district court is a question we review de novo. *See Wilson v. Zoellner*, 114 F.3d 713, 715 (8th Cir. 1997). Factual determinations made by the district court in addressing the jurisdictional questions are reviewed for plain error. *See Osborn v. United States*, 918 F.2d 724, 730 (8th Cir. 1990).

The district court found that the gravamen of Hull's claims is that he was denied a thallium stress test.[5] We agree. Hull contends that his claim does not arise from his relationship with the Plan and the fact that it denied a requested benefit, but rather from a doctor-patient relationship between himself and Dr. Fallon, the Plan administrator. Other than responding to two calls from Dr. Delcau, Hull's treating physician, who called for authorization for the thallium test, Dr. Fallon had no relationship with Hull other than as the Plan administrator.

We addressed the same argument in a case with similar facts. In *Kuhl*, the patient's spouse brought an action asserting, among other claims, medical malpractice after the defendant plan canceled a surgery because it was scheduled at an out-of-network hospital. By the time the surgery could be rescheduled, the patient's health had deteriorated to the point that he was no longer a candidate for the procedure. *See Kuhl*, 999 F.2d at 300. Essentially, Kuhl's claims were based on the manner in which his plan responded to a request for authorization for the surgery. We held that the malpractice claim was preempted by ERISA, and agreed with the district court that "artful pleading by characterizing [the plan's] actions in refusing to pay for the surgery as 'cancellation' or by characterizing the same administrative decisions as

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[5] In making this determination, the district court properly looked beyond the four corners of Hull's pleadings and considered the defendants' notice of removal to determine whether Hull, by artful pleading, sought to deny the defendants' right to a federal forum. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981); *Oglesby v. RCA Corp.*, 752 F.2d 272 (7th Cir. 1985).

'malpractice' does not change the fact that plaintiffs' claims are based on the contention that [the plan] improperly processed Kuhl's claim for medical benefits." *Id.* at 303.

In a case with even greater factual similarity, the Seventh Circuit reached the same result. *See Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482 (7th Cir. 1996). In *Jass*, the plaintiff had a knee replaced. The utilization review coordinator (a registered nurse) for the defendant plan made a medical determination that rehabilitation was not necessary, and secured the patient's early release from the hospital without the needed therapy. As a result, the plaintiff suffered permanent damage. *See id.* at 1485. This injury, the plaintiff claimed, gave rise to a state law negligence claim not preempted by ERISA. The Seventh Circuit disagreed. The plaintiff "alleged that [the reviewing nurse] determined that said course of treatment was not medically necessary and then she proceeded to secure the discharge of the Plaintiff from the hospital. . . . This was a determination of benefits within the meaning of ERISA." *Id.* at 1489.

The district court found that Dr. Fallon, like the nurse in *Jass*, denied the thallium test as part of a determination of benefits owed by the Plan. We agree with the district court's reasoning and conclude that Hull's claims, like the claims advanced in *Kuhl* and *Jass*, are preempted by ERISA. In short, although Hull's characterization of his claims sound in medical malpractice, the essence of his claim rests on the denial of benefits. As a Plan participant, he could have brought an action under section 502(a). Because his claims relate to the administration of benefits, they fall squarely within the scope of section 502(a). Therefore, Hull's claims

are completely preempted by ERISA. Plan administrators necessarily exercise medical judgment in determining benefits due under the plan. To find that Hull's claims are not preempted would be to expose plan administrators to varying state causes of action for claims within the scope of section 502(a). This "would pose an obstacle to the purposes and objectives of Congress." *Pilot Life*, 481 U.S. at 52.

Hull does not appeal the district court's conclusion that his pleadings failed to present a cognizable cause of action under ERISA.

III. CONCLUSION

The judgment of the district court is affirmed.

/s/_____
JUDGE BEAM

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Case No. 4:98CV274 RWS

[Filed: August 18, 1998]

JEFFREY D. HULL,	)
Plaintiff,	)
	)
v.	)
	)
RICHARD H. FALLON, M.D., et al.	)
Defendants.	)
	)

MEMORANDUM AND ORDER

This matter is once again before the Court on Plaintiff's Motion to Remand [#14] and Defendants' Motion to Dismiss [#5].

The Court previously ordered defendants to supplement the record before the Court regarding plaintiff's

participation in an employer sponsored ERISA[1] plan at the time of the events alleged in his Complaint. The record as supplemented now establishes that plaintiff was in fact participating in an ERISA plan at the time he sought and was denied the treatment specified in his Complaint. As a result, plaintiff's state law claims are preempted by ERISA and removal to this Court was proper.

The question before the Court is then whether plaintiff's Complaint states a cognizable cause of action under ERISA. It does not, but, because the Court recharacterized plaintiff's claims, plaintiff will be granted leave to amend his Complaint to properly state an ERISA denial of benefits claim if he so desires.

I. Procedural History

Plaintiff Jeffrey Hull filed this action in St. Louis County Circuit Court naming Richard H. Fallon, M.D. the Medical Director of Prudential Health Care Plan, Inc., Prudential Healthcare System, Inc. and various other Prudential entities as defendants.

Hull alleged that the Prudential defendants, through the actions of defendant Fallon, failed to provide him with appropriate medical treatment. Specifically, plaintiff alleged that on two occasions, once in January and once in February of 1996, plaintiff's primary care physician, Dr. Carey Delcau, contacted defendant Fallon concerning Delcau's diagnosis,

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[1] Employee Retirement Income Security Act of 1974 *29 U.S.C. § 1001 et seq.*

treatment plan and recommendation for a Thallium Stress Test. Dr. Fallon, who was the administrator for plaintiff's employee benefits plan denied both requests for the Thallium Stress Test, authorizing instead a Treadmill Stress Test. Plaintiff alleges that he suffered a myocardial infarction, an occlusion of the right coronary artery, and/or develop more coronary artery disease as a result of Dr. Fallon's refusal to authorize the Thallium Stress Test.

Hull and the Prudential defendants filed a Notice of Removal to this Court pursuant *28 U.S.C. § 1441* arguing Hull's state law claims were preempted by ERISA. Defendants also moved to dismiss the Petition asserting that Hull had failed to state a cognizable cause of action under ERISA.

Hull moved to remand the lawsuit to state court. Hull contends that his claims are not preempted by ERISA because they allege medical malpractice, not a denial of benefits under an ERISA plan.

Both plaintiff's Motion to Remand and the defendants' Motion to Dismiss are currently pending before the Court.

II. Legal Analysis

A. Motion to Remand

The evidence before the Court establishes that plaintiff's state law medical malpractice claims are preempted by ERISA because he was participating in an ERISA plan when Dr. Fallon, the administrator of that plan, declined to

authorize plaintiff's request for a Thallium Stress Test. Therefore, removal of the claims to this Court was proper.

As stated in this Court's prior July 17, 1998 Order, generally, a lawsuit may not be removed to federal court because of a federal question unless that question appears on the face of the "well-pleaded complaint." Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 63 (1987). There is, however, an exception to the "well-pleaded complaint" rule. Id. When the area of state law, upon which the complaint is based, has been completely preempted by Congress the lawsuit may be removed to federal court. Id. This "complete preemption" doctrine extends to claims which are within the scope of ERISA § 502(a). Id.

Section § 502(a) provides:

A civil action may be brought -

1) by a participant or beneficiary -

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan; ...

29 U.S.C. § 1132(a).

The terms "participant" and "plan" as used in § 502(a) refer to an employee participating in an "employee welfare benefit plan" which is defined by ERISA § 3(1), 29 U.S.C. § 1002 as:

> ". . . any plan, fund or program which heretofore or is hereafter established or maintained by an employer . . . to the extent that such plan . . . was established or is maintained for the purpose of providing for its participants or their beneficiaries though the purchase of insurance or otherwise, (A) medical, surgical or hospital care benefits, or benefits in the event of sickness, accident, death or unemployment . . ."

29 U.S.C. § 1002.

The question of whether an ERISA plan exists and subsequently whether plaintiff was a participant is "a question of fact, to be answered in light of all the surrounding facts and circumstances from the point of view of a reasonable person." Kanne v. Connecticut General Life Ins. Co., 867 F.2d 489, 492 (9th Cir. 1998); Harris v. Arkansas Book Co., 794 F.2d 358, 360 (8th Cir. 1986).

A review of the supplemental record filed by the defendants in this action reveals that Hull was in fact participating in an ERISA plan at the time his request for a Thallium Stress Test was denied. Defendants submitted the affidavit of Steven Michael Palesch who attested that Hull was an employee of Prudential Insurance Company of America in January and February of 1996. During that time, Hull

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participated in a plan sponsored by his employer that provided specified medical benefits to its employees. The plan was provided through a group contract issued by Prudential Health Care Plan, Inc. This testimony establishes that Hull participated in an "employee welfare benefit plan" under ERISA § 3(1), 29 U.S.C. § 1002.

The Court must then determine if Hull's claims could have been brought under ERISA § 502(a) and thus, are completely preempted. As set forth above, § 502(a) allows plan beneficiaries to recover for benefits due under the terms of the plan or to enforce or clarify their rights under the plan.

The Seventh Circuit has enumerated three factors which the Court should consider when determining if claims are within the scope of § 502(a): 1) whether the plaintiff is eligible to bring a claim under that section, 2) whether the plaintiff's cause of action falls within the scope of an ERISA provision that the plaintiff can enforce via § 502(a); and 3) whether the plaintiff's "state law claim cannot be resolved without an interpretation of the contract governed by federal law." Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482, 1486 (7th Cir. 1996).

A review of all of these factors supports the conclusion that Hull's claims are really § 502(a) denial of benefits claims.

First, as a plan participant, Hull was entitled to bring suit under § 502(a).

Second, despite Hull's characterization of his claims as sounding in medical negligence, the essence of those claims is a denial of benefits which can be enforced under § 502(a).

Hull argues that he is not contesting a benefits determination but rather the level of medical care given to him by Dr. Fallon. Hull argues Dr. Fallon acted as a treating physician when he determined that Hull was not approved for a Thallium Stress Test.

The evidence does not support this assertion however. Dr. Fallon filed an affidavit with this Court detailing his involvement in the treatment of Hull. In that affidavit Fallon attested that he did not act as a treating physician for Hull. Further, Dr. Fallon testified that his sole contact with Hull's treatment was limited to making benefits determinations in his capacity as an administrator for Hull's medical plan. Dr. Fallon did not prescribe treatment for Hull, he merely identified what treatment would be paid for by Hull's benefits plan.

Hull's claims are more properly characterized as claims for denial of benefits. These types of claims fall within the scope of § 502(a) and can be enforced under that section.

Finally, Hull's claims cannot be resolved without interpreting the benefits contract. The benefits contract dictated the benefits that Hull was entitled to when he sought the Thallium Stress Test. Whether or not the actions of Dr. Fallon and the Prudential defendants were appropriate can only be determined in the context of the language in the benefits contract.

The evidence in the record before the Court establishes that Hull's claim is preempted by ERISA. Therefore,

defendants properly removed the lawsuit to this Court. Plaintiff's Motion to Remand will be denied.

B. Motion to Dismiss

As pointed out in Defendant's Motion to Dismiss, plaintiff's allegations as they are currently stated in plaintiff's Complaint do not state a cognizable cause of action under ERISA. Neither does plaintiff request relief which would be available to him under the statute. However, since this Court has recharacterized the nature of plaintiff's claim, plaintiff will be given leave to amend his Complaint to state a proper ERISA claim if he so desires.

Accordingly,

IT IS HEREBY ORDERED that plaintiff's Motion to Remand [#14] is DENIED.

IT IS FURTHER ORDERED that defendants' Motion to Dismiss [#5] is GRANTED in part and DENIED in part. IT IS FURTHER ORDERED that plaintiff is granted thirty (30) days from the date of this Order in which to amend his Complaint to state a cause of action under 29 U.S.C. § 1001 et seq. If plaintiff fails to timely amend his Complaint, the cause of action against all defendants will be dismissed.

Dated this 18th day of August, 1998.

/s/_____
UNITED STATES DISTRICT JUDGE
RODNEY W. SIPPEL

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Filed: October 7, 1999]

No. 99-1036

JEFFREY D. HULL,
Appellant,

v.

RICHARD H. FALLON, M.D., et al.
Appellees.

ORDER DENYING PETITION FOR REHEARING AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied. (5128-010199)

October 7, 1999

Order Entered at the Direction of the Court:

/s/_____
Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit